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**"NO POLITICAL TRUTH:" *THE FEDERALIST* AND  
JUSTICE SCALIA ON THE SEPARATION OF POWERS**

*Price Marshall* \*

One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim that the legislative, executive and judicial departments ought to be separate and distinct . . . . No political truth is certainly of greater intrinsic value or stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded . . . . I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied.

THE FEDERALIST No. 47  
(J. Madison)

In the United States the separation of powers is an article of constitutional faith. Usually invoked in the same breath with checks and balances, the constitutional principle of separation is part of the familiar American answer to the historic instability of popular government. To layman and lawyer the values of separation are beyond debate; the

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principle guarantees the very structural integrity necessary to commence and continue political debate.

The familiar, however, often becomes the unexamined. There is a deluge of scholarly works on the separation of powers, covering everything from its lineage<sup>1</sup> to its current usefulness.<sup>2</sup> There are not, however, many examinations of the principle's enduring constitutional meaning.<sup>3</sup> Indeed, by the lights of some scholars, the principle has no constitutional meaning in the American context. On this view, rather than a separation of powers, our Constitution merely established "a government of separated institutions sharing powers."<sup>4</sup> Testament to the growing influence of this more recent interpretation is the brace of United States Supreme Court decisions, *Morrison v. Olson*<sup>5</sup> and *Mistretta v. United States*,<sup>6</sup> that have recently, and almost unanimously, worked a quiet revolution in the jurisprudence of separation.

However, the definitional core of separation of powers, its reflective insights about our Constitution and ourselves, still wants exploration. My question is this: What is revealed about the Constitution and its citizens by the way one approaches and analyzes separation of powers issues? The question points up my emphasis. I am concerned with the answers to particular separation of powers cases only insofar as they instruct regarding the answerer's more general conception of the principle. In this essay I shall make a start at responding to my question by examining and comparing the separation of powers juris-

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1. See, e.g., J. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); Wright, *The Origins of Separation of Powers in America*, 13 *ECONOMICA* 169 (1933).

2. See, e.g., *SEPARATION OF POWERS: DOES IT STILL WORK?* (W. Goldwin & A. Kaufman eds. 1986); Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 *AM. POL. SCI. REV.* 151 (1978); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 *WM. & MARY L. REV.* 209 (1989); Symposium, *Separation of Powers and the Executive Branch: the Reagan Era in Retrospect*, 57 *GEO. WASH. L. REV.* 401 (1989).

3. But see Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 *MICH. L. REV.* 592 (1986) (a fine and timely work that is the notable exception in exploring the larger meaning of our separation of powers) and Krent, *Separating the Strands in Separation of Powers Controversies*, 74 *VA. L. REV.* 1253 (1988) (arguing that the debate between "formalist" and "functionalist" theories of separation of powers is largely misconceived, and calling for renewed attention to how the Constitution prescribes how and when each branch can act).

4. R. NEUSTADT, *PRESIDENTIAL POWER* 26 (2d ed. 1980).

5. 108 S. Ct. 2597 (1988) (upholding the constitutionality of the independent counsel provisions of the Ethics In Government Act).

6. 109 S. Ct. 647 (1989) (upholding the constitutionality of the U.S. Sentencing Guidelines and the Commission that promulgated them).

prudence of two important parties to our constitutional conversation: James Madison and Antonin Scalia.<sup>7</sup> More particularly, I shall contrast Publius' way of thinking about separation of powers in *THE FEDERALIST*,<sup>8</sup> numbers 47-51, with Justice Scalia's way of thinking about separation of powers in *Morrison* and *Mistretta*.

I conclude that the Madisonian Publius and Justice Scalia share a strong affinity in their approach to the separation of powers. Ironically, the Publian ancestor is invoked by all sides in the separation debate. In Justice Scalia, though, we have a direct descendant in premise, method, and purpose. Regarding premises, Publius and Scalia agree: man has an imperfect nature that reveals itself nowhere so clearly as in the tendency of human governments toward corruption and oppression. Regarding method, the two men disagree, but only superficially. Publius appears to think about the separation of powers in a much more flexible way than does Justice Scalia. When one attends, however, to their different roles (the Constitution's champion and the Constitution's judge), their respective methods of conceptualizing separation questions converge. Regarding purposes, an important difference of emphasis exists between the two men. For Publius, the separation maxim's value flows from its promotion of liberty under free government. For Justice Scalia the maxim's value inheres in its linkage to the rule of law. These two ways of expressing

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7. My effort is partial in at least two respects. First, I consider only a slice of each individual's evolving view of the separation principle. See, e.g., II M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 74 (1966) (delegate Madison's speech of July 21 urging an even greater sharing of powers between the executive and judicial branches in a "Council of Revision" for all congressional actions); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, XVII SUFFOLK U.L. REV. 881 (1983) (Circuit Judge Scalia urging "that the judicial doctrine of standing is a crucial and inseparable element" of the separation of powers). Secondly, I consider only the views of these two individuals, but the relevant constitutional conversation extends between hundreds of people over the past two centuries.

8. *THE FEDERALIST* is the most famous group of essays generated by the debate over ratification of the U.S. Constitution. The New York state ratification convention occasioned this series of newspaper articles. Alexander Hamilton, James Madison and John Jay each wrote some of the 85 essays supporting the proposed Constitution, though Hamilton penned the vast majority. All of the essays were published anonymously under the collective pseudonym "Publius"—Latin for "the citizen." Madison, however, wrote all five essays dealing with the separation of powers. Madison, then, *is* Publius for purposes of explicating Publius' version of the separation of powers. Though aimed at the New York audience, the essays were widely reprinted throughout the thirteen states. Probably because of its comprehensiveness and the later political success of its authors, *THE FEDERALIST* has largely eclipsed other contemporary writings as the authoritative exposition of the most influential founders' views of the Constitution. D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984) does an admirably thorough job on the whole of Publius' political philosophy. His helpful treatment of separation of powers is at pages 126-47.

similar notions further illustrate the felt difference in roles between the Constitution's advocate and a judge under that supreme law. Notwithstanding this difference of focus, Justice Scalia emerges as the rightful heir of the Publian approach to the separation of powers.

Now comes the obvious question: Given its impressive intellectual pedigree, why is Justice Scalia alone in dissent espousing this approach to the separation and equilibration of powers? I sense that the answer lies in the substance and tendency of the unwritten changes to our Constitution since the New Deal.<sup>9</sup> In a world of "constitutional politics" and "transformative appointments," considering separation and balancing questions as settled is at best anachronistic and at worst wrongheaded.<sup>10</sup> In this new constitutional world the Court's role is as a latter day counsel of censors, obliged to sit in periodic judgement of legislatively generated and popularly unrejected constitutional modifications. This approach to separation of powers reflects a different—more flexible and efficiency directed—Constitution, and a different—more impatient and unengaged—citizenry. It is a conception of Constitution and citizenry as foreign to Publius and as unacceptable to Justice Scalia, as is the approach to the separation of powers it entails.

This essay has two parts. Part I sketches Publius' and Justice Scalia's respective answers to the particular separation questions that confronted them. Part II compares and contrasts their two approaches to separation of powers. By "approach" I mean an individual's general conception of separate and balanced powers. That conception can be located in the premises, method, and purposes revealed in answering separation questions. This second part of the essay attempts to isolate approach by splitting it into these three (tentative) constituent parts: premises, method, and purposes. Some brief explanatory remarks round out the essay.

## I.

The initial task is to sketch the particular answers given by Pub-

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9. See Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 422-25 (1987) (exploring the implications of the structural changes to our Constitution effected by New Deal legislation and subsequent Supreme Court jurisprudence).

10. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1024 (1984) (developing a theory of constitutionalism and judicial review that accounts for constitutional changes occurring through "constitutional" rather than ordinary politics but without formal constitutional amendments); Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1165-67 (1988) (explaining the failed nomination of Judge Robert Bork to the U.S. Supreme Court in terms of a failure of popular support for potentially radical constitutional changes, such as those eventually carried out with popular support [manifest through "constitutional politics"] by President Franklin Roosevelt's Court appointees).

lius and Justice Scalia when faced with a challenge to the meaning of separation of powers. This is not so much to evaluate these answers as to make a first step toward the respective approaches of the two men. This is a proper place to begin, because, to paraphrase Justice Cardozo, their answers are instinct with those approaches. I shall first consider Madison's essays and then Justice Scalia's dissents. Where possible, each individual shall speak for himself.

Madison, writing in numbers 47-51 of *THE FEDERALIST*, confronts and wrestles with the separation of powers. He there undertakes two particular tasks. First, he responds to the charge leveled by "the more respectable adversaries to the constitution" that the document violated "the political maxim" that the three "departments ought to be separate and distinct."<sup>11</sup> Second, he defends the Constitution's "mixture of powers" as the best means of preserving the separation of power required for the enjoyment of political liberty. (47, 324) In Madison's response and defense lies the Publian approach to the separation of powers.

The argument of the essays comes in three parts. The first part is Madison's defense of the Constitution's fidelity to the separation of powers; it takes the whole of number 47. He relies there on both theory and American practice. Madison interprets Montesquieu's maxim of separation only to forbid that "the *whole* power of one department . . . [be] exercised by the same hands which possess the *whole* power of another department." The "political apothegm" does not "mean that these departments ought to have no *partial agency* in, or *controul* over the acts of each other." (47, 325-26) (emphasis in original) Madison also surveys the state constitutions adopted during and after the American revolution. Those documents, without exception, make the case that the three departments "have not been kept totally separate and distinct." (47, 331) He concludes that neither the theory nor the American practice of separation of powers warrants charging the proposed federal Constitution with infidelity to the separation maxim.

The second part of this argument considers alternative ways to maintain and enforce the separation of powers. Madison examines and rejects three proposals in turn: mere "parchment barriers" (48, 333), "occasional appeals" to the people assembled in constitutional conventions (49, 343), and "*periodical*," that is regularly scheduled,

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11. *THE FEDERALIST* No. 47, at 323 (J. Madison) (J. Cooke ed. 1961). All citations are to the Cooke edition. The essay number and page number in that edition will hereafter be noted in the text after each quotation in lieu of further footnoting.

appeals to some more enlightened part of the people. (50, 344) (emphasis in original) He finds each of these methods wanting. During and after the revolution, parchment barriers failed to restrain the "enterprising ambition" of the state legislatures. (48, 334) Further, any kind of appeal to the people will ultimately be ineffective. Faction will result. Passion rather than reason will "sit in judgment." (49, 343) Therefore, Madison concluded, some other way must be found to maintain "the constitutional equilibrium" of separated powers necessary for liberty. (49, 341)

Madison defends the Constitution's solution to "the great problem" of maintaining separation in the third and final part of his argument. (48, 332) The solution comprises all of FEDERALIST 51, rightly counted among the best of all the essays. There Madison explains that the separation of powers can only be maintained by "supplying . . . the defect of better motives" with the "opposite and rival interests" of the constitutional place. (51, 349) Through structural counterpoise, individual "[a]mbition must be made to counteract ambition." (51, 349) Only thus can the constitutional rights of the three departments be adequately policed. (51, 349) Giving the executive branch a share of the legislative power through a conditional negative, and dividing power among two levels of government (possible only in the "compound republic" of America), are Madison's two examples of this tense power-sharing. (51, 351) His point is clear; in a "government which is to be administered by men over men," enduring separation of powers requires jealous sharing of powers. (51, 349)

The last two terms of the United States Supreme Court have brought two decisions regarding the "constitutional principle of separation of powers."<sup>12</sup> Justice Scalia has been a Jeremiah to the Court's Israel, stridently dissenting alone in both cases. His approach to separation of powers jurisprudence emerges from those dissents. As with Publius, it is best to begin our investigation by outlining the structure and focus of Justice Scalia's particular answers to the separation questions he faced.

*Morrison* was a challenge to the Independent Counsel provisions of the Ethics in Government Act of 1978 (EIG Act).<sup>13</sup> Theodore Olson (a former executive branch official under investigation by an Independent Counsel) challenged the appointment, supervision, and removal provisions of the EIG Act as unconstitutional violations of the Executive's appointment and removal powers. Olson also chal-

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12. *Morrison*, 108 S. Ct. at 2602; *Mistretta*, 109 S. Ct. at 678.

13. 28 U.S.C. § 49 (1982).

lenged these provisions as unconstitutional compromises of the separation of powers. The Court, by a vote of seven to one, upheld the EIG Act against each of these challenges. Justice Scalia dissented.

*Mistretta* was a challenge to the United States Sentencing Commission established under the Sentencing Reform Act of 1984 (SR Act).<sup>14</sup> John Mistretta was sentenced under the sentencing guidelines promulgated by the Commission. He challenged his sentence by challenging the constitutionality of the Sentencing Commission. He urged that the power to set the guidelines was an unconstitutional delegation of legislative power and that the membership and location of the Commission in the judicial branch violated the separation of powers. The Court, by a vote of eight to one, rejected both challenges. Justice Scalia dissented.

In *Morrison* and *Mistretta* Scalia rejected the majority's substantive analysis and decisional method. He conceptualized each case as, first and foremost, a dangerous compromise of our basic governmental structure. The Independent Counsel was "a mini-executive," the Sentencing Commission a "sort-of junior varsity Congress."<sup>15</sup> Regarding the Independent Counsel, Scalia saw it as the paradigm case of legislative trespassing on the traditionally executive prosecutorial field. Regarding the Sentencing Commission, he saw a more novel result—legislative abandonment of their own field to members of the other branches. In each case, however, Justice Scalia proclaimed the same general problem: the accountability of government evaporated as the Court "encumber[ed] the Republic" by condoning transient legislative fiddling with the basic structure.<sup>16</sup>

Apart from his substantive disagreements, Justice Scalia also quarreled with the Court's method of considering these separation questions. The Court's majority "ha[d] it backwards" by focusing first on doctrinal technicalities and only then on the separation of powers principles that inform those doctrines.<sup>17</sup> "Worse than what [the Court] has done, however, is the manner in which it has done it . . . . It extends into the very heart of our most significant constitutional function the 'totality of the circumstances' mode of analysis that this Court has in recent years become fond of . . . . This is not analysis; it is ad hoc judgment."<sup>18</sup>

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14. 18 U.S.C. § 3551 (1982), amended by 28 U.S.C. § 991 (1984).

15. *Morrison*, 108 S. Ct. at 2640; *Mistretta*, 109 S. Ct. at 682.

16. *Morrison*, 108 S. Ct. at 2640; *Mistretta*, 109 S. Ct. at 682.

17. *Morrison*, 108 S. Ct. at 2625.

18. *Id.* at 2640-41.



Rather than a case by case judicial judgment regarding how much encroachment upon, or sharing of, powers is "too much," Justice Scalia offered the discipline and predictability of principles.<sup>19</sup> In *Morrison* the Court should have attended to our basic document. The Constitution provides that "all executive powers are the President's."<sup>20</sup> The implied corollary is that any legislative or judicial encroachment upon those powers is constitutionally impermissible. In *Mistretta* the "Constitution's structural restrictions that deter excessive delegation" require that "the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or of judicial power."<sup>21</sup> According to Justice Scalia, structural rigor is infinitely preferable to the vagaries of balancing tests for maintaining our separation of powers.<sup>22</sup>

## II.

What distinguishes the approaches of Publius and Justice Scalia from one another? More broadly, what is it that we can discern about the separation of powers by examining their respective approaches to the celebrated maxim? I sense a great deal of insight lurking in the consonance and dissonance between their two views. It is time to test that sense by comparing and contrasting their respective approaches. That is best done along the three axes comprising a conception of separation of powers—premises, method, and purpose; what I have termed, taken as a whole, as "approach." Again, this admittedly tentative scheme is useful only to focus attention on the constituent parts of the cluster of notions that is separation of powers.

### A. Premises

Madison and Justice Scalia share realistic assumptions about individuals and about the governments peopled by those individuals. These are the common grounds for their separate approaches to separation of powers. Publius is the more explicit in his acceptance of the unchanging human nature that leavens his zeal for popular self-government.<sup>23</sup> Men are moved no less by "prejudices" than by reason, to support their government. (49, 340) His friend Jefferson's suggestion

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19. *Id.* (emphasis in original).

20. *Id.* at 2628 (emphasis in original).

21. *Mistretta*, 109 S. Ct. at 678.

22. *Morrison*, 108 S. Ct. at 2636-37; *Mistretta*, 109 S. Ct. at 682.

23. Wright, *THE FEDERALIST on the Nature of Political Man*, LIX ETHICS 1 (1949) (the seminal interpretation of THE FEDERALIST's realistic view of human nature); see also, EPSTEIN, *supra* note 8, at 193.

of appeals to the people in constitutional convention as the proper medicine for the encroaching branches problem was, therefore, misguided. Not only would these conventions sap the prejudice-driven veneration for the Constitution, they would give rein to unrefined popular feelings. "The *passions* . . . not the *reason*, of the public, would sit in judgement," robbing such deliberations of their effectiveness. (49, 343) (emphasis in original) The fact that we are men and not angels creates the need for government in general, and the need for a certain kind and structure of government in particular. "But what is government itself but the greatest of all reflections of human nature?" (51, 349)

If Justice Scalia doesn't spell out as explicitly as Madison his view of human nature, he implies his views when describing the nature of our government. Government is about "Power." For Scalia, "[t]hat is what [*Morrison*] is about." He chooses an evocative metaphor. The EIG Act is but the latest aggrandizing effort of the legislative "wolf"—the hungry and cunning beast seeking to satisfy a blood lust it can neither control nor moderate. Whether "as a wolf . . . [or] in sheep's clothing," the wolf is nonetheless expected.<sup>24</sup> Scalia's understanding of the congressional hunger to expand its influence manifests itself in his constitutional predictions. In respect to the executive's newly limited removal power, it is now open season on the executive officers of Congress' choice. "The possibilities are endless, and the Court does not understand what the separation of powers, what 'ambition . . . counteract[ing] ambition,' is all about if it does not expect the Congress to try them."<sup>25</sup> In respect to Congress' now unanchored delegation power, we can expect "all manner of 'expert' bodies, insulated from the political process." These congressional creatures will conveniently "dispose of . . . thorny and 'no-win' political issues," letting their masters escape democratic accountability.<sup>26</sup> In each case the point is the same for Scalia; the Court has unleashed the Congress by not appreciating the institutional appetite of the legislative branch.

As Justice Scalia's invocation of Publius suggests, Madison would agree (in principle and based on revolutionary experience) that the legislature needs restraining. "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." (48, 332) Because it is *popular*

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24. *Morrison*, 108 S. Ct. at 2623.

25. *Id.* at 2637 (citation omitted).

26. *Mistretta*, 109 S. Ct. at 680.

government, "[i]n republican government the legislative authority, necessarily, predominates." (51, 350) If the people's representatives are to represent them and their views, then the connection between constituent and congressman allows and encourages popular support of legislative endeavors. The legislative tendency toward aggrandizement of its powers is further fueled by the "enterprising ambition" of the people's representatives. (48, 334)

This need to prevent the legislative department from "extending the sphere of its activity and drawing all power into its impetuous vortex" calls forth the "auxiliary precautions" of sharing powers to keep power separated. (48, 333; 51, 349) Therein lies the Publian defense of our Constitution's structural innovation: fortification of the two other departments so that "by their mutual relations" all may "be the means of keeping each other in their proper places." (51, 347-38) It is a government made safe for non-angels—both governed and governors alike—by its internal structure.

In sum, a great similarity of assumptions about the nature of government appears in Madison's and Scalia's thoughts on separation of powers. Moreover, if we can safely extract Scalia's understanding of human nature from his views on government, then yet another similarity emerges in his and Madison's realistic assessment of political action. Their premises for conceptualizing the separation principle are thus remarkably close.

## B. Method

What method or way of discussing separation of powers have Publius and Justice Scalia developed? Do they consider the principle flexible or rigid? Why do they perceive (or not perceive) play in particular constitutional joints? These questions can be answered by comparing the more general way in which each individual experiences the restraints of separation of powers. The working hypothesis is that for Madison the maxim is quite fluid, while for Justice Scalia it is quite rigorous. This would explain Madison's alleged support—as claimed by the Court's majority in relying on *FEDERALIST* 47—for the result in *Morrison* and *Mistretta*. I will test that tentative conclusion by explicating Publius' and Scalia's methods of dealing with the separation of powers.

Madison's view of the principle of separation appears quite flexible. His interpretation of Montesquieu, based on early state constitu-

tional practice, materially alters the maxim.<sup>27</sup> He contracts the principle of separation until there is almost nothing left of the "political truth." Consider his limiting condition, the total accumulation standard. (47, 325-26) So long as no individual or group of individuals exercising the *complete* power of one branch exercises the *complete* power of another branch, the maxim is not violated. On that standard neither the Sentencing Commission nor the Independent Counsel would violate the maxim as a matter of constitutional arrangement. That is precisely the majority's point in deploying Madison's interpretation in each of these cases.

Madison does, however, note his hesitation with extreme forms of power-sharing. After surveying state constitutional language and practice, he admits that "in some instances, the fundamental principle under consideration has been violated by too great a mixture." (47, 331) Further clarifying and limiting the total accumulation standard, Madison argues that any mixture (even one short of a total accumulation) that deprives a department of "a will of its own" is too great. (51, 348) However, if that amended standard is our only guide, then the exact boundaries of the separation advocated by Madison remain indistinct.

Madison's use of experience to discipline theory reinforces this interpretation of Publian flexibility. One example is the argument just developed: Madison's gloss on Montesquieu based upon "the sense in which [separation of powers] has hitherto been understood in America." (47, 331) Another is his rejection of the "parchment barriers" (48) and the periodic review of a "counsel of censors" (50) as a means of maintaining that separation. "[E]xperience has taught mankind the necessity of auxiliary precautions." (51, 349) (emphasis supplied) In each instance Madison makes theoretical progress by relying on practical experiences.

Publius also neatly elides an exact definition of what constitutes legislative, executive, or judicial power. Publius asks the right question, but never answers it. He notes that it is only "[a]fter discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; [that] the next and most difficult task, is to provide some practical security for each against the invasion of the others." (48, 332) While Madison spends

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27. Montesquieu's discussion of separation of powers, in Part IV, Book XII of *THE SPIRIT OF THE LAWS*, is notoriously opaque. First, he did not develop a theory of separation, he discussed the British constitution. Second, it is not clear he understood what he was attempting to discuss. See VILE, *supra* note 1, at 77-118.

his time on "the next and most difficult task," we are left wondering about the "nature" of each branch. (48, 332)

The only other mention of this definitional difficulty that I can find in *THE FEDERALIST* appears amidst Madison's formidable defense of federalism in essay 37. There he contends that the three departments, being the work of imperfect men, can probably never be exactly defined.

Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. (37, 235)

Again yoking theory to experience, Madison implicitly affirms a flexible separation of powers through his understanding of each branch's evanescent nature.

Measured against this Publian flexibility, Justice Scalia's way of thinking about separation of powers seems inexplicably and unnecessarily rigid. A complete examination reveals otherwise. Appearances do count for something, however, and making the case for Scalian rigorism is a useful analytic beginning.

The Justice's conceptualization of both *Morrison* and *Mistretta* bespeaks a rigid view of separation. In the former case, the hub of Scalia's opinion is that the Constitution requires "all of the executive power" to be "vested in a President of the United States."<sup>28</sup> Since the Independent Counsel is neither the Chief Executive nor accountable to him, it is an unconstitutional office. In the latter case, the congressional delegation of law-making power to a non-legislative branch agency is the constitutional infirmity. "The only governmental power the Commission possesses is the power to make law; and it is not the Congress."<sup>29</sup> The definitional grip of each branch's proper province gives power, and rigidity, to Scalia's view of the separation principle.

At the same time, however, Scalia's method is not barren of flexibility. He, like Madison, admits to a certain fuzziness around the edges of each branch's proper sphere. Speaking respectfully of the precedential corpse—*Humphrey's Executor*<sup>30</sup>—at the Court's feet, Scalia agrees that while the demarcation between "purely executive"

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28. *Morrison*, 108 S. Ct. at 2626 (emphasis in original).

29. *Mistretta*, 109 S. Ct. at 680.

30. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (confining the President's

and other officers has never been entirely clear, the line was nonetheless a useful landmark.<sup>31</sup> Likewise his understanding that delegation inevitably involves law-making power. "The whole theory of *lawful* congressional 'delegation' is . . . that a certain degree of discretion, and thus of law-making, *inheres* in most executive or judicial action . . . ."<sup>32</sup> Behind both these insights lies an appreciation of measured play within constitutional joints.

These hints of flexibility in Scalia's separation of powers thinking make two important points. First, some flexibility exists in his view. Scalia's notions of separation are not so closely tied to the constitutional text that they admit of no elasticity. Secondly, though, that flexibility remains quite limited. Justice Scalia is only willing to travel a short distance from the command of text. His position is well illustrated by both decisions under scrutiny. In *Mistretta*, after admitting the looseness of delegation doctrine, Scalia uses this looseness as the main reason why the courts "must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation."<sup>33</sup> He admonishes that courts must strictly maintain the three separate powers we already have, in the form we already have them.

In *Morrison* the rigidity of Scalia's method is even more telling. After asserting that the executive power must extend to all executive functions, Scalia asks the Court to consider a hypothetical: is it conceivable that if Congress passed a statute depriving itself of less than "full and entire control" over some legislative area, the Court would mince details over how important the area or how much control was given? "Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress."<sup>34</sup> Scalia just described the then pending case of *Mistretta v. United States*, and he, not the Court, was the only one whose method of addressing separation of powers questions was rigorous enough to "require" the Congress to promulgate the sentencing guidelines.

Even though Madison and Scalia seem to differ in the flexibility of their respective methods, they agree on the uses of experience. Like Publius, Justice Scalia marshals history to his argumentative cause. When faced with the difficulty of locating the nature of the Independ-

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removal power to "purely executive" officers and allowing the Congress some latitude in prohibiting the removal of other executive officers).

31. *Morrison*, 108 S. Ct. at 2636-37.

32. *Mistretta*, 109 S. Ct. at 678 (emphasis in original).

33. *Id.*

34. *Morrison*, 108 S. Ct. at 2628.

ent Counsel's office in a particular branch, Scalia looks to prosecutorial history. He agrees with the majority's conclusion that prosecution is "typically" an executive function, but he goes further. For Scalia, history demonstrates that prosecution is *always* an executive function.<sup>35</sup> When faced with the similar problem of responding to Congress' placement of the Sentencing Commission in the judicial branch, Justice Scalia turned to function only upon finding no history that informs the question. "It would seem logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions."<sup>36</sup>

Scalia's attention to "who controls" is but another manifestation of his recognition of the realities of politics as revealed through history. The same insight was revealed in his acceptance of Madisonian premises regarding inter-branch relations. His characterization of the facts in *Morrison* makes the point again: "the Legislative and the Executive Branches became embroiled in a dispute concerning the scope of the congressional investigatory power, which—as is often the case with such inter-branch conflicts—became quite acrimonious."<sup>37</sup> For Justice Scalia, experience teaches. We should expect such conflicts and allow them to work as structural safeguards for our Constitution rather than seeking their solution.

Given the similarity between Publius' and Justice Scalia's argumentative premises and their use of experience, it seems proper to seek a reconciliation of their diverging methods of thinking about separation of powers. Put more pointedly, is there any way to reconcile Publian flexibility and Scalian rigidity? One possible road of reconciliation lies in a greater attention to role. Publius is an advocate for the Constitution; his office is persuasion. Justice Scalia is just that: a Justice of the Supreme Court created, empowered, and bounded by the Constitution Publius championed. Scalia's charge is to uphold the Constitution under which he lives and serves. The difference is one of place; where each man sits colors his method of discussing and thinking about the separation of powers.

Justice Scalia hints at his appreciation of this difference in role in *Mistretta*. He laments the majority's dependence on Madison's arguments. Publius' interpretation of Montesquieu, allowing shared as well as separate powers, was only to defend "the commingling specifically provided for in the structure that he and his colleagues had

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35. *Id.* at 2626.

36. *Mistretta*, 109 S. Ct. at 681.

37. *Morrison*, 108 S. Ct. at 2623 (citations and quotations omitted).

designed.” Wholesale judicial revisions of the structure allowing increased commingling are therefore out of constitutional bounds. “[T]he framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document.” According to Justice Scalia, Madison “would be aghast to hear” his interpretation of Montesquieu “used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, ‘too much commingling’ does not occur.”<sup>38</sup> While there may be enough flexibility in the system for the Court to pass on commingling at the “margins,” when “the outline of the framework” is in question, then for Justice Scalia the issue is clear-cut: the Court’s obligation is to enforce the existing framework.<sup>39</sup> To do otherwise is to mistake the judicial role for that of the advocate, or worse, for that of the framer.

This role-based reconciliation is also supported by *Representative* Madison’s actions in the first United States Congress. One provision contained in the package of proposed conciliatory amendments to the newly ratified federal Constitution—suggestions that Madison edited, introduced, and shepherded through the House of Representatives—was a statement regarding the separation of powers. The clause did not proclaim in the manner of many early state constitutions that the celebrated maxim of separated powers was inviolable. Rather, Madison’s proposal required that “the powers delegated by this Constitution, are appropriated to the departments to which they are respectively delegated.” The House approved this provision without alteration. The Senate, however, omitted the clause without explanation from the list of amendments ultimately forwarded to the several states. Madison’s proposal is noteworthy. His suggested amendment would have further solidified the *existing* constitutional arrangement rather than inviting later structural rearrangement.<sup>40</sup>

To conclude, our working hypothesis—that a substantial difference in method exists between Publius and Justice Scalia regarding the separation of powers—must give way to a more nuanced understanding. First, they share at least some similarity in method because both of their ways of thinking about separation rely heavily on experience. Second, and more importantly, the dissonance between their

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38. *Mistretta*, 109 S. Ct. at 683 (emphasis supplied).

39. *Id.*

40. See XII THE PAPERS OF JAMES MADISON 202 (W. Hutchinson ed. 1979) (listing the amendments proposed by Madison in his June 1789 speech to the House of Representatives); W. SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 181-91 (1977) (elaborating the congressional debates over the proposed amendments).



two views—between Publian flexibility and Scalian rigidity—fades in the face of a heightened awareness of their roles. Justice Scalia rightly feels confined within the structure erected by Madison and the other framers, and accepted by the ratifiers. Were Publius to go on the Court, I conjecture that his method of thinking about the separation of powers would harden, just as Representative Madison's views did. If my speculation is correct, then as with their premises, Madison's and Scalia's ways of conceptualizing the separation of powers converges. We can better assay the differences that remain between the two men by a closer look at the purposes each of them sees as served by the separation maxim.

### C. Purposes

Publius and Justice Scalia emphasize different values served by separated and shared powers. For Publius the "sacred maxim of free government" is instrumental in providing free government and the "preservation of liberty" that goes along with that system. (47, 331, 324) If the separation fails and all governmental power begins to accumulate in a single branch, then "the very definition of tyranny" awaits the citizenry. (47, 324) The failure of previous constitutional efforts to maintain the necessary separation occasioned the federal Constitution's "auxiliary precautions." (51, 349) The three departments must be separated, *and* "so far connected and blended, as to give each a constitutional controul over the others," in order that "the degree of separation the maxim requires as essential to a free government" may be "duly maintained." (48, 332) According to Publius, "[j]ustice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." (51, 352) The separation and sharing of powers is simply another human attempt to that end.

Justice Scalia's approach to separation questions does not emphasize justice, liberty, or even free government. Rather, the "rule of law," providing just government and meaningful rights in its train, animates his separation of powers decisions. By the "rule of law," I take Scalia to mean the Anglo-American law-making tradition of political fidelity to general substantive rules and to regular procedures in generating and applying those rules.<sup>41</sup> This is by no means uncon-

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41. See Shklar, *Political Theory and the Rule of Law* and Weinrib, *The Intelligibility of the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (A. Hutchinson and P. Monahan eds. 1987) for two recent essays that attempt a clarification of this important but amorphous notion.

nected to the values Publius sees in the maxim; indeed it is substantively quite similar. But the difference in emphasis reveals Scalia's larger concerns and therefore is worth exploring.

Scalia opens his dissent in *Morrison* quoting the thirtieth article of the Massachusetts Declaration of Rights. This provision codifies a version of the separation maxim, but with a distinctive concluding explanation: the powers of the government are to be separated "to the end that it may be a government of laws, and not of men."<sup>42</sup> This is the "proud boast of our democracy."<sup>43</sup> The rule of law is the benchmark for Scalia's two dissents. The rule of law requires accountability. Accountability guarantees the people's right to judge their magistrates and either re-elect them or throw the rascals out. The "mini-executive" Independent Counsel is a constitutionally impermissible solution because it eliminates this accountability.<sup>44</sup> The substance of the Congress' delegation of law-making power to the Sentencing Commission is also constitutionally untenable because it too violates this principle. The Congress' grant exceeds—by abdicating—the powers delegated to the Legislature by the people. Relinquishing legislative responsibility is the definition of lawlessness.<sup>45</sup> Scalia is also firm in regard to the Court's ad hoc, "totality of the circumstances" method of deciding separation questions. "A government of laws means a government of rules. Today's decision on the fragmentation of executive power is ungoverned by rule, and hence ungoverned by law."<sup>46</sup>

Scalia's focus on the connection between the separation of powers and the rule of law indicates his larger concerns about constitutional adjudication. His recent call for a return to "The Rule of Law as a Law of Rules" is presaged by his vision of the purposes served by the separation of powers.<sup>47</sup> His ponderings about the nature of his *judicial* office are yet another indication how distant, both in time and

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42. MASS. CONST., Dec. of Rights, art. XXX (1780). Scalia slips a bit in his historical explanation that this document is the source of the phrase. See Michelman, *Foreward: Traces of Self Government*, 100 HARV. L. REV. 4 (1986) (tracing the thought from the writings of English oppositionist James Harrington through John Adams and John Marshall into late seventeenth century American argument). History aside, Scalia's point regarding the continuing influence of the notion is well taken.

43. *Morrison*, 108 S. Ct. at 2622.

44. *Id.* at 2638-39.

45. *Mistretta*, 109 S. Ct. at 679.

46. *Morrison*, 108 S. Ct. at 2640-41.

47. Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (address by Justice Antonin Scalia, The 1989 Oliver Wendell Holmes Memorial Lecture at The Harvard Law School (February 14, 1989)).

in place, he feels from our Constitution's framing. Scalia does, however, acknowledge and accept Publius' understandings of separation. It is the principle of empowering each branch to resist the others, the sharing of powers, that "gives comprehensible content to the appointments clause, and determines the appropriate scope of the removal power."<sup>48</sup> Further, one of the purposes of the separation of powers is to "ensure that we do not lose liberty" in our hastening after governmental efficiency. While endorsing these Publian insights, however, Justice Scalia contextualizes his approach to the separation. The best fence against a government of men is a "secure structure of separated powers."<sup>49</sup> And by Scalia's estimation, only judges are around to mind those fences. This peculiarly judicial obligation accounts for his focus on the rule of law values of the separation of powers.

Our effort to reconcile Publius' and Justice Scalia's different purposive emphases regarding the separation principle has led us again to their different roles. As the advocate, Publius can be more concerned with popular and general values, such as liberty, justice, and free government. As the judge, Scalia must stay closer to the ground. The everyday tools of judging—rules and laws—such is the stuff that the value of separation of powers is made on for the judicial craftsman.

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Our examination of the apparent dissimilarity between Publius' and Justice Scalia's approach to separation of powers has revealed a substantial similarity in their respective conceptions. Regarding premises they agree: man has an imperfect nature and his tendency in government is to overstep prescribed bounds. The seeming distance between Publius' flexible method of thinking about separation of powers and Justice Scalia's correspondingly rigid method contracts when one considers their respective roles. The variance between their different emphases on the value and purpose of separation is at once compatible and illustrative. The explanation is once again one of role. The distance between maintaining liberty and guaranteeing the rule of law is precisely the difference between the advocate and the judge; both purposes are variations on the same theme of maintaining free government.

If Justice Scalia's understanding of the separation of powers is Madisonian, then why is he dissenting alone in *Morrison* and *Mistretta*? The question implies originalism, but that is not my intention.

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48. *Morrison*, 108 S. Ct. at 2625.

49. *Id.* at 2629.

In a sense we are all originalists when it comes to these cases. Even the majority in both *Morrison* and *Mistretta* unabashedly relied on what they took to be the true Madisonian approach to separation. More precisely, the question is: given their error as a matter of history and interpretation, how is it that the non-Madisonian, elastic approach to separation of powers now commands the Court?

The explanation lies in the combustion of two elements: the impure separation of powers that characterizes our system and the changed notion of what our Constitution is. To maintain constitutional equilibrium, the framers created an unstable mixture: powers were shared in order to be kept separated. The novelty of the innovation has finally overtaken the polity. The fact is that we have as much checking and balancing as we do separation. The expansion of the former is by definition the contraction of the latter. The framing innovation pointed the way toward, if not set in motion, even greater commingling. Still within the supposed bounds of the celebrated maxim, more sharing was the logical response to current, but currently insoluble, problems. The instances that come immediately to mind are the creation of the modern administrative state during the New Deal and the expansion of that bureaucracy during the push for a Great Society. The Independent Counsel and the Sentencing Commission are merely the latest examples of the trend.

The second factor that explains Scalia's separation of powers vigil is, as Professors Ackerman<sup>50</sup> and Sunstein<sup>51</sup> suggest, that these and other changes to our Constitution have been effected without formal amendments. This severalty of changes to our constitutional structure—the New Deal and its commerce clause jurisprudence, the Warren Court's federalization and expansion of individual rights and the erosion of state sovereignty—have all occurred without taking the "constitutional road to the decision of the people" mapped out in Article V. (49, 339) If politics can be constitutional and appointments transformative, then it is no longer constitutionally credible to stay within the document when judging structural innovations.

Publius' and Justice Scalia's respective approaches to the separation of powers, and to the Constitution embodying those powers, are remarkably similar. The Court, and perhaps the nation, on the other hand, currently have a different conception of the separation of powers and a new constitution embodying that vision. The irony of these transformations looms. Had there been any political truth left in the

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50. Ackerman, *supra* note 10.

51. Sunstein, *supra* note 9.

celebrated maxim after the American founding, this new principle of separation and its constitution could not have taken root. The very success of the general Madisonian solution has eroded the particular Madisonian structure.